charged for hoarding or concealing rice under Reg. 6(3) of the Lembaga Padi dan Beras Negara (Licensing of Wholesale and Retail Dealers) Regulations 1973 and it was wrong for the trial Magistrate to make such a finding in order to justify his act and order confiscation of the 67 gunny bags of rice. Under the rice retailer licence (Exhibit P5) granted to the appellant he is allowed to store not exceeding 168 piculs of rice on the business premises and as long as he maintains this limit he cannot by any stretch of the imagination be said to be hoarding rice without some evidence of concealment. And there was none here. On the facts, the finding of hoarding by the trial Magistrate cannot be supported.

Next, the trial Magistrate said at page 13:

"Accused has testified he was unaware of the need to inform LPW of the change (of address). Accused is not illiterate and has been in the rice business since 1974. Ignorance of law is no defence although the court does not seek to hastily punish an accused for a mere mistake. However, if a mistake is self-induced and accused is grossly negligent in serving to his affairs as a prudent man of business should, that gross negligence may amount to knowledge of the circumstances. In view of the facts, the court finds it hard to believe that accused was totally ignorant of the condition of his licence...."

In *Evans* v. *Bartlam*[2] Lord Atkin said:

"For my part I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application."

Applying this test to the 3rd charge it is clear that the appellant cannot successfully plead ignorance of Reg. 6(2) in answer to the charge.

But in my opinion, ignorance of the law, *a fortiori*, a statutory offence where *mens rea* is not required, is a factor to be considered in order to determine whether or not the appellant had *mens rea* in fact. Now, what are the facts? It seems to be not in dispute that because of poor business at No. 1, Tai Ton bazaar, Bau, the appellant moved his business to No. 35, Jalan Ong Guan Cheng, Bau (see 2nd charge) in 1976. Since that time, the rice retailer licence of the appellant had been renewed at least on 5 separate occasions by the authority.

On these uncontradicted facts it would be quite difficult to hold that the appellant had *mens rea*.

Since the trial Magistrate ruled that there was hoarding when there was in fact no hoarding in law and since he also ruled that there was some *mens rea* when the facts did not support this finding, I am constrained to hold that the trial Magistrate had purported to exercise his discretion on wrong principles. Under the circumstances, I have no alternative but to quash the order of forfeiture of the 67 gunny bags of rice. I order that the 67 gunny bags of rice be returned to the appellant forthwith.

Order accordingly.

Solicitors: *Chan & Chan.*

MUN LOONG CO. SDN. BHD. v. CHAI TUCK KIN

[O.C.J. (Mohamed Azmi J.) November 13, 1981]
[Kuala Lumpur — Civil Suit No. 2188 of 1977]

Passing-off — Business name "Mun Loong" — Whether plaintiff had monopoly in use of the word "Mun Loong" meaning "a lot of prosperity" — Different types of business carried out by both parties — Injunction sought refused — Application of common law principles.

The plaintiff company had two departmental stores in Kuala Lumpur. It sued the defendant in the tort of passing-off at common law, and claimed for an injunction to restrain the defendant from using the words "Mun Loong" as part of, or in connection with his optical goods business at No. 133 Jalan Ipoh.

Held, dismissing the plaintiff's claim:— (1) injunction will be granted, if as a matter of fact, the defendant's business name is calculated to deceive either by diverting customers from the plaintiff to the defendant, or by occasioning a confusion between the two businesses. But where, as in the present case, the defendant carries on different type of business from that of the plaintiff, it must be shown that the defendant has done something to deceive;

(2) the words "Mun Loong" are known Chinese words meaning "a lot of prosperity". It is the common objective of all business enterprise to be properous and in the absence of evidence that the defendant was dishonest in adopting that name, there was no good reason why the defendant should not trade under the name "Mun Loong."

[Editorial Note: See note "Passing off — Boutique with similar name" at [1981] 2 M.L.J. cl.]

Cases referred to:-

(1) *The North Cheshire & Manchester Brewery Co. Ltd.* v. *The Manchester Brewery Co. Ltd.* [1899] A.C. 83.
(2) *Ewing* v. *Buttercup Margarine Co. Ltd.* [1917] 2 Ch. 1.
(3) *A.G. Spalding & Brothers* v. *A.W. Gamage Ltd.* [1915] 32 R.P.C. 273.
(4) *Treasure Cot Co. Ltd.* v. *Hamley Bros. Ltd.* [1950] 67 R.P.C. 89.
(5) *Baume Co. Ltd.* v. *A.H. Moore Ltd.* [1958] 1 Ch. 907.
(6) *Henderson & Anor.* v. *Radio Corp. Pty. Ltd.* [1969] R.P.C. 218.
(7) *The Clock Ltd.* v. *The Clock House Hotel Ltd.* [1936] 53 R.P.C. 269.
(8) *British Legion* v. *British Legion Club (Street) Ltd.* [1931] 48 R.P.C. 555.
(9) *Totalizator Agency Board* v. *Turf News Pty. Ltd.* [1972] R.P.C. 579.
(10) *Eastman Photographic Materials Co. Ltd.* v. *The John Griffiths Cycle Corp. Ltd. & The Kodak Cycle Co.* [1898] 15 R.P.C. 105.
(11) *Lloyd's* v. *Lloyd's (Southampton) Ltd.* [1912] 29 R.P.C. 433.
(12) *Harrods Ltd.* v. *R. Harrod Ltd.* [1924] 41 R.P.C. 74
(13) *Dunlop Pneumatic Tyre Co. Ltd.* v. *The Dunlop Motor Co.* [1907] A.C. 430.

(The following cases were cited but not mentioned in judgment: *The Society of Motor Manufacturers & Traders Ltd.* v. *Motor Manufacturers' & Traders' Mutual Insurance Co. Ltd.* [1925] 1 Ch. 675, *Levy* v. *Walker* (1879) 10 Ch. 436.)

CIVIL SUIT.

Lee Tatt Boon for the plaintiff.

Wong Soon Foh for the defendant.

Mohamed Azmi J.: The plaintiff company, which has two departmental stores in Kuala Lumpur, is suing the defendant in the tort of passing-off at common law, and claims for an injunction to restrain the defendant from using the words "Mun Loong" as

part of, or in connection with, the name, style, title or description of his optical goods business at No. 133, Jalan Ipoh. The company also claims for nominal damages and other consequential reliefs. In Chinese, the term "Mun Loong" as a trade name means "a lot of prosperity" or "plenty of prosperity". As I understand it, the plaintiff company's claim is for an injunction to restrain the defendant from trading under the name of "Mun Loong Optical Contact Lens Centre" to the extent that he must either strike out from the name the words "Mun Loong" or else change completely the name of his business, on the ground that it is calculated to deceive the public into the belief that the defendant firm is connected with the plaintiff company, or that the business of the defendant is the same or in any way connected with the business of the plaintiff company. The question for determination is: ought the defendant be restrained from using the style and name comprising the words "Mun Loong", on the ground that it is misleading and enables the defendant to acquire profits illegitimately from the goodwill which attaches to the plaintiff company? From the authorities cited, whether a claimant has established a case under the common law doctrine of "passing-off', must necessarily depend on the particular facts of each case.

From the pleadings and statement of agreed facts, the following are not in dispute. The plaintiff company is incorporated under the Companies Ordinance 1940-1946, and has its registered office at No. 8 & 12A, Jalan Petaling, Kuala Lumpur. The company was incorporated in the year 1954 for the purpose of acquiring as a going concern the business of a trading firm which had existed since the year 1949 and carried on business under the name of Chop Mun Loong together with the goodwill of the said business, and generally for the purpose of carrying on the business of a universal provider, outfitter and to perform or procure the performance of services of all kinds, and to carry on all kinds of trades, business and operations whether manufacturing or otherwise. The principal place of business of the plaintiff company since its incorporation and before the acquisition of Chop Mun Loong, was and still is, at No. 8 & 12A, Jalan Petaling. In 1973 the company established a branch at No. 113, Jalan Tuanku Abdul Rahman, which exists as a departmental store dealing in a large variety of products for retail. The name "Mun Loong Co., Sdn. Bhd." has always appeared in conspicuous letters in both the premises at No. 8 & 12A, Jalan Petaling, and No. 113, Jalan Tuanku Abdul Rahman, and is visible from a considerable distance. The defendant, on the other hand, is the sole proprietor of an optical shop under the name and style of Mun Loong Optical Contact Lens Centre, and has his principal place of business at No. 133, Jalan Ipoh, Kuala Lumpur. On or about June 22, 1977, a letter from a firm of solicitors namely Syarikat K.R.P. Perumal, intended to be delivered to the defendant's business premises at Jalan Ipoh, was delivered to the plaintiff company's departmental store at No. 113, Jalan Tuanku Abdul Rahman. The defendant refused to discontinue the use of the name "Mun Loong" and to take the necessary steps to change the name of his business although requested to do so by the plaintiff company.

At the commencement of this hearing, three issues have been agreed for the determination of the court. They are: —

(1) Whether the plaintiff company has monopoly in the name "Mun Loong";

(2) Whether plaintiff company has a goodwill in the name "Mun Loong". Plaintiff company contends that it needs to prove only goodwill *simpliciter,* but the defendant argues that the goodwill must extend to cover the activity carried on by the defendant, i.e. optical goods; and

(3) Whether the defendant has done anything calculated to produce the belief in the minds of reasonable persons that his business is the business of or connected with that of the plaintiff company.

At common law, it is an actionable tort for one person to represent his business to be that of another, or to mislead the public into believing that it is, because the person guilty of the *deception* thereby profits illegitimately from the *goodwill* which attaches to the other business. The commonest means by which this deception is practised is by the adoption of a business name which is calculated to cause the public to confuse the spurious business with the genuine one. If the spurious business is conducted by a company incorporated with a name likely to cause such *confusion,* the owner of the genuine business may obtain an injunction to restrain the company from trading in its own name or even continuing to have its own name. If the injunction takes the latter form, the company must either change its name or be wound up. (See *Pennington's* Company Law, 4th Edition, page 16). However, a passing-off action lies only when the company carries on the *same or similar kind of business* as the plaintiff as in *The North Cheshire & Manchester Brewery Co. Ltd.* v. *The Manchester Brewery Company Ltd.,*[1] or where *business orders* are likely to come to the company because the public will believe that it is in some way connected with the plaintiff as in *Ewing* v. *Buttercup Margarine Co. Ltd.*[2] To my mind, the authorities cited before me are capable of being divided into two categories. The first category involves cases where the plaintiff is claiming goodwill or reputation in a name attached to certain products or goods, e.g. footballs in *A.G. Spalding & Bros.* v. *A.W. Gamage Ltd.,*[3] dolls and baby cots in *Treasure Cot Co. Ltd.* v. *Hamley Bros. Ltd.,*[4] watches in *Baume Co. Ltd.* v. *A.H. Moore Ltd.,*[5] and gramophone record cover in *Henderson & Anor.* v. *Radio Corp. Pty. Ltd.*[6] The second category relates to goodwill or reputation attached to a trade name under which a business is carried on, e.g. *The Clock Ltd.* v. *The Clock House Hotel Ltd.,*[7] *British Legion* v. *British Legion Club (Street) Ltd.,*[8] and the TAB case in *Totalizator Agency Board* v. *Turf News Pty. Ltd.*[9] A case can however fall under both categories, like the 'Kodak case' in *Eastman Photographic Materials Co. Ltd.* v. *The John Griffiths Cycle Corp. Ltd. & The Kodak Cycle Co. Ltd.*[10] In the present case, it would appear that the plaintiff company is not claiming goodwill or reputation attached to any particular product, but the claim falls under the second category of cases. In short, we are not here dealing with a case of passing-off in respect of goods, but we

are concerned with passing-off involving the use of business name. Just as a man is not entitled to pass-off his goods as being somebody else's goods, so a man is not entitled to carry on business in such a way as to represent his business as being that of another person. From the authorities cited, I am of the view that where — as in the present case — the claim for goodwill is in respect of business name, a distinction must be made between a situation where both parties are carrying on the same or similar type of business, as opposed to different type of business. The distinction appears necessary because where the business carried out is the same or similar, the probability of a confusion arising is readily inferred by the courts; and, if there is deception, it does not matter whether the defendant knew of it or not. Similarly, in some cases, the name of one particular individual or firm has obtained such universal reputation in connection with a particular class of goods that it acquires a secondary meaning, and it becomes self-evident that if a second person enters the trade under a name which is the same or similar, confusion must arise. In such instance, the court would grant relief in appropriate cases, even if there is no actual confusion, deception or injury. The mere probability of it is sufficient. Thus, where the defendant's business carries the same or similar kind of business as the plaintiff as in *Lloyd's* v. *Lloyd's (Southampton) Ltd.*,[11] the *Clock Ltd.* case (*ante*) and *Manchester Brewery* case (*ante*), it is not necessary to prove actual fraud or deception by the defendant. Injunction will be granted, if as a matter of fact, the defendant's business name is calculated to deceive either by diverting customers from the plaintiff to the defendant, or by occasioning a confusion between the two businesses, e.g. by suggesting that the defendant's business is an extension, branch or agency of, or otherwise connected with the plaintiff's business. But where the defendant carries on different type of business from that of the plaintiff, I am of the view that it must be shown by the plaintiff that the defendant has done something to deceive. Unless he is guilty of some kind of fraud or deception, by representing his business as that of the plaintiff, or mislead the public into believing that it is that of the plaintiff, then depending on the particular facts of each case, a passing-off action will invariably fail. Thus, in *Harrods Ltd.* v. *R. Harrod Ltd.*,[12] although the defendants were dealing in money-lending business and the plaintiffs were even prevented by their Articles of Association to deal in such business, on appeal, injunction was granted on the ground that there was evidence of fraud on the part of the defendants from their business advertisements in newspapers. The plaintiffs in that case carried on as ancillary to their large commercial business, the business of bankers. The defendants issued an advertisement, "Make R. Harrod Limited your bankers: overdraft without security of £100 upwards". From these advertisements, the defendants were clearly representing themselves as the banking business of the plaintiffs. On the contrary, in *Dunlop Pneumatic Tyre Co. Ltd.* v. *The Dunlop Motor Co.*,[13] although both companies were, as in *Harrods* case, doing different types of business, the court refused to give relief because, apart from the fact that the defendants were using their own surname, there was no evidence that they had practised any deception. Fraud was not established and the court refused to grant an injunction. In outlining the true statement of the law, Pollock M.R. had this to say in *Harrods* case at pages 81 and 82:

> "Several cases have been cited to us, but I think the earliest case, in 1878, which came before the Master of the Rolls, Sir George Jessel, rightly lays down the principle on which the court acts. He says this at page 563 (9 Chancery Division): 'What the law did prevent was fraud; and it prevented not only actual fraud, that is, fraud intentionally committed, but it also prevented a man from carrying on business in such a way, whether he knew it or not, as to represent that his business was the business of another man.' Then he says, on the question of evidence: 'It might happen that the mere using a well-known fancy name would be evidence of an intention on the part of the person using it to commit a fraud.' And then he applies that doctrine to the case before him. But, as I read the decision of Sir George Jessel, he quite plainly stated that where the court comes to the conclusion that there is fraud — and he gives direction as to what is evidence of fraud — it is quite clear that the court is sufficiently armed to interfere; and I think that decision is one which has been acted upon in other cases.
>
> Now when one reads all those cases together, it seems to me to be quite clear that where there is fraud the court can interfere, and there is fraud where you find a particular name taken by a defendant, a well known fancy name, which could not be taken for a legitimate purpose, and a name which is taken, to use Lord Justice Buckley's words, for the purpose of posing as being some person whom you are not. And indeed, in the later case to which we were referred, of *Aerators Limited* v. *Tollit* (L.R. (1902) 2 Ch., p. 319), Lord Justice Farwell, then Mr. Justice Farwell, said this, that you can interfere where the use of the particular name is calculated to deceive, even though it does not point to intentional fraud, and it is a question of fact in each case as to whether or not the names were so alike as to induce the belief that the companies are identical. So that, where there is fraud, the court can interfere, and where the names are so alike as to be calculated to deceive it can interfere. Further it may draw the inference that there is fraud where there is an attempt to pose as being a particular business firm when you are not, and are not entitled to use their name."

In this case, before dealing with the agreed issues, I think the court has to determine whether the defendant firm is carrying the same or similar type of business as the plaintiff company, although from the third agreed issue, it can be inferred that the parties have agreed that they are carrying on different types of business. I hope I will be forgiven for not going into detail the numerous cases cited by counsel for both parties, as most of them are distinguishable on the facts, although they reaffirm the principles governing the tort of passing-off at common law. It seems clear from *Dunlop* case (*ante*) that although the objects of the plaintiff company and the defendant firm need not be absolutely identical in order to entitle the plaintiff company to relief, there must be great similarity, unless the defendant is guilty of deception, in which case, there need not be any similarity at all. On the facts of the present case, it is my finding that the type of business carried on by the defendant firm is almost totally different from the plaintiff's business. The defendant deals entirely in optical goods, whereas the plaintiff company deals in textile, garments and cosmetics. Although defendant's shop is situated along the same road, as one of plaintiff's departmental stores at Jalan Petaling, the plaintiff's business does not deal in power optical lenses at all, which is the principal occupation of the defendant firm and is reflected in his business name itself. Customers of the defendant must be eye-tested first by optician at

the shop before making any purchase, whereas there is no such optician in plaintiff's departmental stores. The plaintiff company only deals in ordinary sunglasses as part of ladies' accessories. These sunglasses form an insignificant part of both the plaintiff's and the defendant's businesses. The similarity ends there. This is confirmed by the evidence of Mr. Soon Show Voon (PW1), the managing director of plaintiff company, who testifies that the company only sells sunglasses off and on, as they are regarded only as ladies' accessories and that, at the moment, the company is not known for optical goods. In view of my finding that the type of business carried on by the plaintiff and the defendant is almost entirely different, the plaintiff must prove under the third agreed issue that since adopting the words "Mun Loong" as part of his business name, the defendant has done something to deceive. There must be proof that the defendant is, or has been, or can be inferred to be, guilty of fraud or deception.

Dealing now with the first agreed issue, it is the contention of the plaintiff company that over the years through intensive advertisement, it has obtained a monopoly in the name of "Mun Loong". Six witnesses (PW2 to PW7) have testified that for varying periods extending to ten years, they have associated "Mun Loong" with the plaintiff's shops at Jalan Petaling and Jalan Tuanku Abdul Rahman. As such, it is argued that an injunction should be granted because the plaintiff company has acquired a monopoly in the business name "Mun Loong". For this proposition, the plaintiff company is relying on a number of authorities including the *Kodak* case (*ante*) and *Harrods* case (*ante*). But, on the evidence before me, it is my finding that the plaintiff company has not acquired in the name "Mun Loong" such reputation as "Kodak" or "Lloyds", which are household words not only in Britain but also in some parts of the world. As was held by the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Dunlop Motor Co.* (*ante*), "In such case it nearly always is a question of fact. . . ." In dismissing the appeal against refusal to grant an injunction, Lord James of Hereford said at page 437:

"Now, in what does the deception consist, and who were the persons deceived? The complainers have no claim to the exclusive use of the name Dunlop. It is a common name in Scotland. The respondents had traded as R. & J. F. Dunlop. The appellants have chosen to announce themselves as the Pneumatic Tyre Company preceded by the name Dunlop, and their case seems to be that, having done so, they shut out persons named Dunlop from employing that name in connection with a company at all similar in object to the tyre company. I agree that the objects of the two companies need not be absolutely identical in order to entitle the complainers to relief, but there must be great similarity. In this case I do not think that the measure of similarity established is sufficient, either in the name employed or in the objects of the trade sought to be carried on.

The complainers say, We are a pneumatic tyre company. The respondents represent themselves to be a motor company. Then, as I have said, the tyre company does not sell motors. The motor company appears to do so. If in respect of some minor articles there might be a common production, yet the main objects of the two businesses are different. As to these minor articles, I agree with the view expressed by Lord Kyllachy, that the complainers have not proved that they have any exclusive right in connection with the sale of those articles to the use of the name Dunlop, nor have they proved that the name in question has any special reputation or value in connection with such minor articles.

Then, secondly, who are they who will be deceived by the name used by the respondents? It appears to be admitted that an ordinary business person would not be misled, but it is alleged that the unwary would. Well, of course, there are unwary people in this world, but I think that a man who employs his own name in carrying on his business has the right to regard the people whom he may attract as being capable of exercising and being in the habit of exercising thought; and I cannot differ from the judgment of Lord Low, in which he says: 'Any one who took the trouble to think about the matter would see that the respondents' company was a motor company and the complainers' a tyre company. I do not think that the respondents are liable to have their business practically stopped unless they change their name simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers."

Similarly, in the present case, I find the words "Mun Loong" are known Chinese words meaning "a lot of prosperity" or "plenty of prosperity" (see evidence of DW1 Mr. Ho Wai Kong — a retired court interpreter). According to the evidence, it is an auspicious name, which, in my view, should not be monopolised by any particular company or person. In fact, according to the defendant, that was the reason why he chose the name. Indeed, from the 1979 Chinese telephone directory (Exhibit D4), eleven trading institutions were listed with the name "Mun Loong", notwithstanding plaintiff company's argument that they are interested in the words "Mun Loong" only in English but not in Chinese characters. Amongst other things, it is the common objective of all business enterprise to be prosperous and, in the absence of evidence that the defendant is dishonest in adopting that name, I see no good reason why the defendant or other businessmen should not trade under the name "Mun Loong". It is not a fanciful name created by the owners of plaintiff company; nor is it their surname. Even in the field of departmental stores, I am unable to persuade myself that on the evidence, the plaintiff company has acquired in the name "Mun Loong" the same or anything near the degree of reputation acquired by the plaintiffs in the various cases cited such as *Lloyds* case (*ante*) as a world renowned shipping agent, or *Ewing Buttercup* case (*ante*) as a reputable British retailer in margarine; or *Kodak* case (*ante*) where the name has been universally identified with the plaintiffs and their goods, or *Harrods* case (*ante*) where the plaintiffs are well-known throughout England and have a business of established reputation. In such cases, mere probability of a confusion or the public being deceived would be sufficient. It should be noted that in *Kodak* case, the court found both parties were dealing in similar type of business — the plaintiffs producing "Bicycle Kodak" and the defendants producing "Kodak Cycle". In the circumstances of the present case, I find the plaintiff company has no monopoly in the name "Mun Loong".

On the second agreed issue, from the evidence adduced by the seven witnesses for the plaintiff company, at the most, the company could only claim to have acquired some goodwill in the name or words "Mun Loong" as a departmental store, but certainly not as an optical goods shop. It seems unnecessary to consider whether the plaintiff company need only prove goodwill *simpliciter* on the name "Mun Loong" or goodwill in the name extending to optical goods, particularly when the plaintiff company's claim does

not concern goodwill or any particular product or goods. But for whatever it is worth, if the plaintiff company's claim had been on goodwill in the name attached to its products, then it would be necessary for the plaintiff company to establish that it has a goodwill in the name "Mun Loong" to cover powered lenses and optical goods and not merely goodwill *simpliciter* or goodwill to cover textiles, garments and cosmetics. As stated earlier, in this case we are not dealing with reputation products like *Kodak, Buttercup* or *Spalding,* but we are dealing with goodwill in the name or style of the business. There is no evidence in this case that the plaintiff company is selling reputation product like Mun Loong sunglasses. The plaintiff company's complaint is against the use of the words "Mun Loong" in the name of the defendant's optical business. In the circumstances, I find the plaintiff company's failure to establish a goodwill in the name "Mun Loong" to cover optical goods is fatal, if its claim had been in respect of goodwill attached to its particular goods or products. But the second agreed issue does not really arise in this case, having regard to the nature of the plaintiff company's claim.

On the third agreed issue, from the evidence of the seven witnesses called by the plaintiff company, there is nothing to suggest that the defendant has done anything to represent his optical business, as that of plaintiff; nor is there evidence that he has done anything to mislead the public into believing that it is. Indeed, according to the evidence of Mr. Lee Dee Yee (PW6), the only independent witness called by plaintiff company who is not commercially connected with the company, he does not associate plaintiff company business with reading glasses but, like the other witnesses, he associates the words "Mun Loong" only with textile, cosmetics and luggage. In this connection, I accept the evidence of the defendant (DW2) that he adopted the business name "Mun Loong" in 1977 for his optical shop because it is auspicious, although he knew at that time that plaintiff company and other companies are using similar name in Kuala Lumpur. I also accept his evidence that he has never used the plaintiff company's logo, and that he never advertised or promoted his firm as a branch or associated firm of plaintiff company. There is no evidence to prove that the defendant has done anything to associate his optical firm with plaintiff company's departmental stores. I find the defendant has done nothing calculated to produce the belief in the minds of reasonable persons that his business is the business of, or connected with, that of the plaintiff company. The fact that in May 1977 a small parcel meant to be delivered to the defendant at No. 133, Jalan Ipoh was delivered to the plaintiff company's departmental store at No. 113, Jalan Tuanku Abdul Rahman, and that in July 1977, a solicitor's letter intended for the defendant at No. 133, Jalan Petaling, was delivered to the plaintiff company's departmental store at No. 113, Jalan Tuanku Abdul Rahman, cannot, in my view, be attributed to any action or misconduct on the part of the defendant. When the solicitor's letter (Exhibit AB1) is examined, which by the way is from the defendant's own solicitors, I am satisfied that if the letter had been properly addressed to Jalan Ipoh, the Postal Department would have no difficulty in delivering it to the defendant shop. Similarly, in the case of the small parcel, from the postal receipt (Exhibit AB2), it is clearly the fault of the sender from Singapore by addressing it to No. 113, Jalan Tuanku Abdul Rahman instead of No. 133, Jalan Petaling. In my opinion, those two incidents do not prove confusion as a result of the name "Mun Loong", but the misdelivery was due more to the carelessness of the defendant's solicitor and the sender from Singapore in writing out the address. Further, in a case where it is alleged that the defendant's trading name is likely to be confused with the plaintiff company's name, the persons in whose mind the confusion must be likely to arise are the persons who may desire to do business with the plaintiff company, either as customers or fellow traders. (See *Halsbury's* Laws of England, 3rd Edition, Volume 38, page 609, para 1011). In the instant case, both the defendant's solicitor and the Singaporean cannot be said to be interested in doing business with the plaintiff company, since the letter and the small parcel were in fact meant for the defendant. The plaintiff company cannot, therefore, say that because of these two incidents, it has a strong case of actual confusion being created as a result of the defendant using the name "Mun Loong". In any event, based on the judgment of the House of Lords in *Dunlop* case (*ante*), the defendant in this case should not be held liable merely because a thoughtless, careless or stupid solicitor or a foreigner has made a blunder by sending goods or letters to the wrong address. The two 1977 incidents are, in my view, insufficient to establish deception perpetrated or likely to have been perpetrated by the defendant. Nor are they sufficient to prove that real danger of confusion does exist or is likely to occur. From the testimony of witnesses, there is no evidence that the defendant (DW2) has ever represented his optical business to be that of the plaintiff company, or connected with the plaintiff company's business. As already stated, I accept his evidence that he never advertised or promoted his firm as a branch or an associate of the plaintiff company. It is not challenged that he never used the logo of the plaintiff company. Even in his advertisement in the Chinese press (Exhibit P8), it has the picture of his own shop at Jalan Petaling — thus destroying any suggestion that by using the name "Mun Loong", he intended to deceive or his action is calculated to deceive the public. To avoid confusion, not only the defendant but also the plaintiff company have included the picture of their respective shops at Jalan Petaling and Jalan Tuanku Abdul Rahman in the 1979 Chinese Telephone Directory (Exhibit D4). Notwithstanding the words "Mun Loong" it is also inherent in the name employed by the defendant that he is solely dealing in optical goods, and not in textile, garments or cosmetics. Having regard to the evidence as a whole, I have come to the conclusion that the defendant is not guilty of any fraud, dishonesty or deception, and he has not illegitimately profited from the departmental store goodwill, which might have been acquired by the plaintiff company in the name "Mun Loong". On the contrary, the defendant has taken reasonable steps in his business advertisement and in the particularisation of his business name to avoid any possibility

of a confusion between the two business establishments. It is my finding on the facts that the defendant business name is not calculated to deceive so as to divert business from the plaintiff company to the defendant, or occasion a confusion between the two businesses. The managing director of the plaintiff company (PW1) gives two reasons why the company has brought the present suit. Firstly, the plaintiff has spent a lot of time, effort and money to associate "Mun Loong" with the company, and, secondly, the plaintiff company fears that if the defendant firm went out of business, the plaintiff's name might be tarnished as some creditors might confuse the defendant's business name with the plaintiff company. In my view, both reasons are not really relevant for the purpose of determining the present dispute. Since both parties carry on different type of business, in the absence of proof that the defendant has done something deceitful or dishonest, the injunction sought should not be granted.

For the above reasons, I dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Skrine & Co.; Chooi & Co.*

HAMZAH BIN MUSA v. FATIMAH ZAHARAH BINTI MOHAMED JALAL

[A.C.J. (Mohamed Zahir J.) July 22 & November 25, 1981]
[Kota Bharu — Civil Appeal No. 19 of 1980]

Contract — Agreement by Muslim husband to pay wife $5,000 if he divorces her — Whether contract can be enforced in Magistrate's Court — Whether contract is immoral or opposed to public policy — Contract Act, 1950, s. 24.

Islamic Law — Agreement by Muslim husband to pay wife $5,000 if he divorces her — Whether enforceable in civil court — Kelantan Shairyah Courts and Muslim Matrimonial Causes Enactment, 1966, ss. 9 & 60.

In this case the appellant on marrying the respondent had agreed to pay her $5,000 if he divorced her. Subsequently the appellant divorced the respondent and she claimed the sum of $5,000. The learned Magistrate gave judgment in favour of the respondent and the appellant appealed.

Held: (1) the learned Magistrate had jurisdiction to hear the case;

(2) the contract in this case was not immoral or opposed to public policy under section 24 of the Contract Act, 1950;

(3) in this case the appellant had agreed to marry the respondent on the stipulation that if he were to divorce her he would pay her $5,000. She had fulfilled her term of the obligation by marrying him and upon divorcing her, the appellant was obliged to fulfil his term of the contract.

Cases referred to:-

(1) *Nafsiah* v. *Abdul Majid* [1969] 2 M.L.J. 174.

(2) *Sak'amah binte Saridin* v. *Tasmin bin Abdul Samad* [1938] M.L.J. 38.

CIVIL APPEAL.

P. Dorairaj for the appellant.

M.S. Nayagam for the respondent.

Cur. Adv. Vult.

Mohamed Zahir J.: The defendant is appealing against the decision of the Magistrate ordering him to pay the sum of $5,000 being the amount due as a result of a breach of an undertaking given by the defendant to his ex-wife, the plaintiff, that he would not divorce the plaintiff and that if he did so he would pay her $5,000.

In the trial below, the defendant did not dispute the undertaking but averred that the undertaking was unenforceable as it was in violation of the provisions of Islamic law. The defendant further pleaded that any remedy after the divorce should be in the Kadhi's Court as both parties are Muslims.

According to the evidence it was the defendant, a school teacher, who prepared the undertaking. It is termed as "Surat Perjanjian" which reads as follows: —

"Bahawa adalah saya Hamzah bin Musa, KP. No. 0839666, tinggal di Kampong Kelubi, Jalan Machang, Pasir Puteh, Kelantan, dengan sesungguhnya serta dengan hati yang suci mengaku bahawa:—

Saya bersetuju pada perjanjian yang telah saya buat dengan isteri saya Fatimah Zaharah binti Mohd. Jalal KP. No. 1533783, tinggal di Kampong Pauh Lima, Bachok, Kelantan. Saya tidak akan cerainya, sekiranya saya cerai isteri saya Fatimah Zaharah binti Mohd. Jalal ini saya akan didaawa dan dibayar sebanyak $5,000.

Tertulis pada 25hb. December, 1976.

Adalah saya yang benar
(HAMZAH BIN MUSA)"

The brief history of the couple is rather tragic. The defendant was married nine times and had divorced his wives nine times and had 8 children. One of his wives was the plaintiff and she was divorced by him three times. After her third divorce the plaintiff became pregnant. According to the defendant, he had to remarry her in the interest of the child. But after divorcing her the third time, the defendant had no further right to "rujuk" or claim back the plaintiff as his wife as he was entitled to do after the first two divorces. According to the Muslim law, after the third divorce the woman must first remarry another person in a proper marriage ceremony and if she is again divorced by the new husband, then she would be at liberty to remarry the former husband.

To circumvent this restriction of the religious law, the parties, according to the evidence, went into the shady marriage ceremony which is called "Cina Buta". This was done by the parties making an arrangement with another man who was willing to marry the woman on condition that after the marriage had been solemnised, the man would divorce the woman and the former husband would then be able to remarry the woman after the eddah period when a divorced woman can remarry. This practice is being frowned by most Muslims as an attempt to circumvent the religious law. The practice is at present on the decline in Malaya as compared to many years ago. But it is none-the-less still being practised by the short tempered couples and hasty decision-making husbands who later regret their decision. Feeling that they must marry and live together again for the sake of their children or for love alone or for whatever reason, some couples would be prepared to undergo the "Cina Buta" ceremony however much distasteful it is.

The defence counsel in arguing the appeal before me submitted that the Magistrate has no jurisdiction